No. 18.

Brief of Seltzer for P. P.

Supreme Court of the United States.

Filed Sept 30, 1897.

No. 18, OCTOBER TERM, 1897.

LEWIS MILLER,

Plaintiff in Error,

VS.

THE CORNWALL RAILROAD COMPANY,

Defendant in Error.

In Error to the
Supreme Court of the State of Pennsylvania.

PAPER BOOK OF PLAINTIFF IN ERROR.

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1. STATEMENT OF THE CASE.

The plaintiff in error sued the Cornwall Railroad Company, a corporation of the State of Pennsylvania, in the Court of Common Pleas of Lebanon county, Pennsylvania, in trespass to recover damages for personal injuries sustained through the negligence of the said Cornwall Railroad Company while (as he claims) a passenger on one of their trains.

The facts in the case were these, viz:

Messrs. Coleman & Brock Bros. are the proprietors of the Lebanon Furnaces on the outskirts of Lebanon. Five miles distant are the Cornwall Ore Hills. These two points are connected by the Cornwall Railroad Company. Messrs. Coleman & Brock Bros. received large quantities of ore from the Ore Hills over the Cornwall Railroad Company; and for this purpose they had their own private cars which were carried between their furnaces and Cornwall by the defendant company.

The contract between Messrs. Coleman & Brock Bros. and the Cornwall Railroad Company was as follows:—Messrs. Coleman & Brock Bros. were to deliver their cars at the yard of the railroad company at Lebanon, and then the railroad company would take charge of them out to Cornwall. Here Messrs. Coleman & Brock Bros. would take charge of them again, have them taken by another company to the ore banks, loaded with ore and returned to Cornwall. From here the cars would be carried to Lebanon Furnaces by the defendant company.

Lewis Miller, the plaintiff in the case, was the servant of Messrs. Coleman & Brock Bros. to run the cars from the furnaces down to the railroad company's yard, which was done by gravity, deliver them to the conductor of defendant company and take charge of them again when delivered at Cornwall, see that they were loaded with ore and

delivered again at Cornwall to defendant company to haul to Lebanon furnaces.

The contract further provided that the charge for freights against Messrs. Coleman & Brock Bros. should include the right of their servant when engaged in this work to pass to and fro between Cornwall and Lebanon on any train most convenient to him, *whether passenger or freight.*

The accident from which the injury resulted to the plaintiff occurred on Oct. 16, 1890, at a point in the road about 100 yards south of Cornwall Station, at a frog in a sharp curve from which a siding runs to a warehouse. That morning Mr. Miller, the plaintiff, brought about a dozen or twenty of Messrs. Coleman & Brock Bros.' cars down from the furnaces to the defendant company's yard. The company made up a freight train, including therein the cars brought down from the furnaces by Mr. Miller, and started southward towards Cornwall, Mr. Miller riding on the train. When they came to the frog and switch on the other side of Cornwall, the hind part of the train ran off the track and was wrecked. In this wreck Mr. Miller was hurt.

The plaintiff's allegation was that the cause of the accident was the unsafe condition of the track and frog at this point where the accident occurred. He further alleged that the too fast running by the engineer contributed to the accident. Much testimony was taken on these points by both plaintiff and defendants. The Court below

left the case to the jury and reserved the question "as to whether there was any evidence of the defendants' negligence to go to the jury."

The jury returned a verdict in favor of the plaintiff for $900.

At the trial of the case the fundamental question was whether (as contended by the plaintiff) his case was that of a passenger seeking to recover against his carrier or that of an employee seeking to recover against his employers, and the determination of the question depended upon whether the first section of the Act of the General Assembly of the State of Pennsylvania, approved April 4, 1868, (P. L. 58), was unconstitutional and avoided by the 1st section of the XIVth Amendment to the Constitution of the United States.

The 1st section of the Act of April 4, 1868, reads as follows, viz:

"Sec. 1. When any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employee, the right of action and recovery in all such cases against the company shall be only such as would exist if such person were an employee: Provided, that this section shall not apply to passengers."

Under the laws of the State of Pennsylvania as they are now and were at the time of the pas-

sage of this Act, all that a passenger injured through some defect in the road-bed, or in the means of transportation, need prove is, that he was injured while riding on the train, and the law presumes that the carrier was negligent, and it then becomes the duty of the carrier to show that he was not negligent, and that the injury was caused by some cause for which he was not responsible; while in a suit by an employee the rule is different, and it is necessary for the employee to affirmatively prove that the employer was negligent and failed in his duty.

Before the Court and jury, and before the Supreme Court of Pennsylvania, the plaintiff contended that the 1st section of the Act of April 4, 1868, was unconstitutional, alleging amongst other reasons, that it was avoided by section 1st of the XIVth amendment to the constitution of the United States, and could not be considered in the trial of the case, and that therefore the plaintiff when injured, was a passenger on defendants' train. The defendants affirmed the constitutionality of the Act, and contended that the plaintiff should be treated as an employee of the defendants, and a fellow-servant of the train hands running the train on which he was when injured, and that if the accident was caused by excessive fast running of the train the negligence was that of the engineer running the same, a fellow-employee, for which plaintiff could not recover.

The plaintiff also asked the Court to charge the jury, *inter alia*, as follows, viz:

"1st. Lewis Miller, the plaintiff, was a passenger on the train when he received his injury."

"2nd. The Act of April 4, 1868, is unconstitutional and void."

"3rd. The right of the plaintiff to have remedy for his injury was a well-known and clearly defined common law right, one of the inherent indefeasible rights guaranteed to all citizens by the constitution. The Act of April 4, 1868, can therefore not be invoked by the defendant against the plaintiff. And it is not remedy by the 'due course of law.'"

"4th. If the jury believe that the train ran off the track because of the too fast driving over the frog in the curve of the road then the defendants' negligence is made out, and the plaintiff is entitled to recover, unless he by some act contributed to his own injury."

These points were all refused by the Court, who in their charge left the question of defendants' negligence and the question of plaintiff's contributory negligence to the jury, with instructions that they were to treat the plaintiff as if he was an employee of The Cornwall Railroad Company, and that his right of recovery was only that of an employee, and that if they found that the train ran off the track because of the too fast running of the same, the plaintiff could not recover, because the engineer, whose negligence in that case caused the accident, was his fellow-servant.

Under the laws of the State of Pennsylvania, if the first section of the Act of April 4, 1868, is

unconstitutional, the right of action and recovery of the plaintiff was that of a passenger, and not such only as would exist if he had been an employee of the defendants; and that the laws of the State of Pennsylvania applicable to the case of the plaintiff as a passenger injured through the negligence of the defendants, a carrying railroad company, would have required the Court at the trial to submit the question of defendants' negligence and plaintiff's contributory negligence to the jury without the reserved question whether there was "any evidence of defendants' negligence to go to the jury," and would have required the Court, as a matter of law, to declare that the engineer of the defendants, running the train on which the plaintiff was riding when injured, was the servant of the defendants and his negligence, their negligence, and not the fellow-servant of the plaintiff, and would have required the court to submit the question of the engineer's negligence in running the train too fast, and thereby contributing to the accident, to the jury instead of withdrawing it from them and imputing it to a fellow-servant, and would have required the Court to enter judgment upon the verdict of the jury in favor of the plaintiff.

The said Court of Common Pleas of Lebanon county directed judgment to be entered in favor of the defendants, The Cornwall Railroad Company, notwithstanding the verdict of the jury in favor of the plaintiff.

That the said Lewis Miller, plaintiff, by an

appeal, took the said cause to the Supreme Court of Pennsylvania, to No. 275, January Term, 1893, Eastern district; which Court affirmed the judgment of the Court of Common Pleas of Lebanon county against the plaintiff and in favor of the defendant, the Cornwall Railroad Company.

Afterwards on January 8, 1894, the plaintiff moved the Supreme Court of Pennsylvania for a re-argument of the cause, alleging again, *inter alia*, the reason that the first section of said Act of April 4, 1868, was unconstitutional and avoided by the 1st section of the XIVth amendment to the Constitution of the United States; which argument asked for was also refused.

We therefore most respectfully ask the Court to reverse the Supreme Court of Pennsylvania on the ground that the Act of April 4, 1868, is not "Due process of law," and is a denial to the plaintiff by the State of Pennsylvania of "The equal protection of the laws."

II. ASSIGNMENTS OF ERROR.

1. The learned Court erred in not sustaining the first specification of error submitted by Lewis Miller, which specification of error was as follows: "The Court erred in not affirming the first point of the plaintiff, which was as follows: 'I, Lewis Miller, the defendant, was a passenger on the train when he received his injury.'" Refused.

2. The learned Court erred in not sustaining the second specification of error submitted by Lewis Miller, which specification of error was as follows: "The Court erred in not affirming the second point of the plaintiff, which was as follows: '2. The Act of April 4th, 1868, is unconstitutional and void.'" Refused.

3. The learned Court erred in not sustaining the fourth specification of error submitted by Lewis Miller, which specification of error was as follows: "The Court erred in holding that Lewis Miller, the plaintiff, was a fellow-servant of the engineer running the train when he received his injuries."

4. The learned Court erred in not sustaining the fifth assignment of error submitted by Lewis Miller, which was as follows: "The Court erred in entering judgment for the defendant, *non obstante veredicto*."

5. The learned Court erred in not sustaining

the sixth assignment of error submitted by Lewis Miller, which was as follows: "The Court erred in not entering judgment upon the verdict in favor of the plaintiff. Under all the evidence the case was one for a jury to pass upon."

6. The learned Court erred in not granting the prayer of the plaintiff for a re-argument and in not reversing the judgment of the Court of Common Pleas of Lebanon county in entering judgment for the defendant, *non obstante veredicto*."

7. The learned Court erred in not reversing the judgment of the Court of Common Pleas of Lebanon county in favor of the defendants, The Cornwall Railroad Company, notwithstanding the verdict of the jury, in favor of the plaintiff, Lewis Miller; and in not entering judgment in favor of the plaintiff, Lewis Miller, and against the defendants, The Cornwall Railroad company, upon the verdict of the jury.

III. ARGUMENT OF PLAINTIFF IN ERROR.

The whole case turns upon the question whether the first section of the Act of the General Assembly of the State of Pennsylvania, approved April 4, 1868, is constitutional or is unconstitutional and avoided by the 1st section of the XIVth Amendment to the Constitution of the United States. (1st section printed on page 4.)

The second section of the same act, which reads as follows, viz:—

"Section 2. That in all actions now or hereafter instituted against common carriers or corporations owning, operating or using a railroad as a public highway, whereon steam or other motive power is used, to recover for loss and damage sustained and arising either from personal injuries or loss of life, and for which, by law, such carrier or corporation could be held responsible, only such compensation for loss and damage shall be recovered as the evidence shall clearly prove to have been pecuniarily suffered or sustained, not exceeding, in case of personal injury, the sum of three thousand dollars, nor in case of loss of life, the sum of five thousand dollars." was in *Passenger Railway vs. Boudrou*, *92 Pa. 475*, declared unconstitutional, the Court using this language:—

"But one point (*p. 481*) remains that calls for remark. In Central Railroad of N. J. vs. Cook, 1 W. N. C. 319, it was held that a plaintiff can recover the amount of his loss or damage, that he pecuniarily suffered or sustained from personal injuries by reason of the defendant's negligence, notwithstanding the Act of April 4, 1868, Pamph. L. 58. * * * Its authority is in conservation of the reserved right to every man, that for an injury done him in his person, he shall have remedy by due course of law. The people have withheld power from the legislature and the courts to deprive them of that remedy, or to circumscribe it so that a jury can give only a pitiful fraction of the damage. Nothing less than the full amount

of pecuniary damage which a man suffers from an injury to him in his lands, goods or persons, fills the measure secured to him in the Declaration of Rights. As well might it be attempted to defeat the whole remedy as a part. * * * A limitation of recovery to a sum less than the actual damage, is palpably in conflict with the right to remedy by the due course of law."

This language is of stronger force against the first than the second section. The second limits the amount of compensation but leaves the right to it complete; the first limits, lessens, abridges the right, takes away all compensation. If we for a moment concede that the Legislature had the authority to abridge the right to compensation, we acknowledge the authority to take away the entire right, and leave the injured party without redress. We can make no such a concession. Nor does the law.

1st. THE PLAINTIFF A PASSENGER.

The proviso of the Statute says: "This section shall not apply to passengers." Under the law of the State of Pennsylvania as it was before the passage of this Act, the plaintiff was clearly a passenger, as the citations below undeniably establish. We, however, contended further that, when the Legislature added the proviso in favor of passengers, it included the case of the plaintiff, because they were presumed to have known the law (Endlich on the Interpretation of Statutes,

Sec. 182), and meant all passengers; and did not intend to make or have the Courts to make a new definition for a passenger, but intended to accept the Court's definition as it then existed. This is especially true of an Act which, if not more, is in derogation of the common law, and is said (*Kirby vs. Penna R. R. Co. 76 Pa. 507*) to be in the nature of a penal statute.

To enlarge. The plaintiff was not employed by the defendant Company, but by Messrs. Coleman and Brock Bros. The plaintiff brought the cars to defendants' yards at Lebanon and took charge of them again when delivered by defendants at Cornwall. The trip took about twenty minutes. While the train was being run to Cornwall, the plaintiff had nothing to do with the cars or their running. They were solely in the charge of defendants' servants.

Another important fact is, the plaintiff was not required to ride with or on the cars he brought to defendants' yard; but could go on any train that suited his convenience, *whether freight or passenger*. While he was on the train he was "engaged or employed" in nothing in the sense in which these words are used in the Statute properly construed. It is true he was on the cars and going over the road. But so is any other passenger. He was engaged or employed in doing the work of Messrs. Coleman & Brock Bros. But only in the same sense as a drummer starting out from New York or Philadelphia is "engaged or employed" by the

firm that purchases his labor. Nobody would dream of classing a drummer anything but a passenger.

What should the trial Court have called him had he been hurt while going to Cornwall on a passenger train on the same errand? Had one of the firm chosen to go for a load of ore instead of sending their servant, should he be treated as an employee of defendants? And yet, did not the plaintiff stand on the rights of his employers? Certainly! Had the plaintiff been hurt while on a passenger train, the trial Court could hardly have fallen into the outrageous error of considering the plaintiff anything else than a passenger. The work of the plaintiff was at Cornwall, and the defendants were in truth only carrying him to and from his work and *were well paid* for doing so.

Cases similar to this were thrice decided by the Supreme Court of Pennsylvania, two before and one after the passage of the Act. In each case, not one of which was as strong as this, the plaintiff was declared a passenger. The first in point of time was *Penna. R. R. Co. vs. Henderson, 51 Pa. 315*, decided May 15, 1866. It is as follows:— Henderson was a drover and transported several carloads of cattle from Indiana to Philadelphia and received a "drover's pass" to the same place. He paid nothing for his ticket. Held that the price Henderson paid for the freight included the cost of his passage, and that he was "not therefore a gratuitous but a paying passenger."

There is no difference between the plaintiff's case and that of Henderson's except that the one shipped ore and the other cattle; and with the change of the word "ore" for "cattle," the language used in that case could be applied to this.

The next case was that of the *Cumberland Valley R. R. Co. vs. Meyers, 55 Pa. 288*, decided July 3, 1867, which was as follows:—Meyers was a private conductor for the firm of Henderson & Meyers whose cars the railroad company moved by their engines. Immediately behind the cars of Meyers were cars of another party to be left at Mechanicsburg. At the request of the Company's conductor, Meyers drew the coupling at a signal from the private conductor of the hind cars. Meyers was thrown off and hurt. The case was tried and found in favor of Meyers and reviewed by the Supreme Court, and it was held that Meyers was a passenger. The court used this language: "He did an act of mere accommodation at the request of the conductor without hire or reward, and as soon as he had performed it and resumed his proper position of a passenger on the train he became entitled to the protection which such a relation gave him, and a jury would not be called on to discriminate against him with an unfriendly eye." The Court also says that if Meyers had been hurt while engaging in uncoupling, he could not have recovered.

The plaintiff's case is much stronger. He only used the trains of defendants to go to and from his work, which was at Cornwall.

The last case was that of *O'Donnell vs. The Allegheny Valley R. R. Co., 59 Pa. 239*, decided after the passage of the Act. O'Donnell, living at Kittanning, was hired by the Company to work on the railroad at a bridge crossing the Kiskeminetas, fifteen miles south of Kittanning. O'Donnell, for the wages he received, was to have the privilege of riding to and from his work free of charge. He was injured one evening while riding home from his work. On a review of the case, it was held that O'Donnell was a passenger and *not a fellow-servant of the train hands.* In the opinion *Cumberland Valley R. R. Co. vs. Meyers* is commented upon and approved as the general and safe rule governing such cases.

To these authorities directly in point we can not help but add the comments on the case of *Penna. R. R. Co. vs. Henderson, supra*, in the case of *Penna. R. R. Co. vs. Price, 96 Pa., 256, page 266:*—"He (Henderson) was traveling with his stock, and was as much a passenger as if he had been traveling with his trunk. He was under the control of the conductor, and was bound to conform to the reasonable rules of the company the same as other passengers. He had a direct contract relation with the company. * * * It may very well be that *Henderson vs. Railroad Co.* belongs to a class of cases intended to be covered by the proviso of the Act of 1868."

In the case a passenger is defined as "One who travels in some public conveyance by virtue

of a contract, express or implied, with the carrier, as the payment of fare, or that which is accepted as equivalent therefor."

This definition of a passenger describes the plaintiff's case exactly.

Had the trial Court and the Supreme Court of Pennsylvania affirmed our position that the Act of April 4, 1868, was avoided by the first section of the XIVth Amendment to the Constitution of the United States, the case of the plaintiff would have been that of a passenger seeking to recover against his carrier instead of an employee seeking to recover against his employer. In such case, under the laws of the State of Pennsylvania, it would have been the duty of the trial Court to affirm the plaintiff's first point and declare him a passenger, and also to submit the question of defendant's negligence to the jury without reservation. The law would also have required the Court to submit the question of the engineer's negligence in running the train too fast to the jury as in such case the negligence of the engineer would have been the negligence of the company. The question would then have been one entirely for the jury. Even upon the one-sided way it was submitted to them, they found in favor of the plaintiff.

"When in the performance of this contract (that of a passenger), a passenger is injured, without fault on his part, the law raises, *prima facie*, a presumption of negligence, and throws on the Company the *onus* of showing it did not exist.

This legal presumption may be repelled by proving that the injury resulted from inevitable accident, or that it was caused by something against which no human foresight and prudence could provide. Whether such circumstances exist as will repel the legal presumption of negligence, is a question of fact to be determined by the jury, from all the evidence in the case."

Sullivan vs. The Phila. and Reading R. R. Co., 30 Pa. 234.

"Where a passenger is injured by an accident arising from a collision, or a defect in the machinery or roadway, he is required, in the first place to prove no more than the fact of the accident and the extent of the injury; a *prima facie* case is thus made out, and the onus is thus cast upon the carrier to disprove negligence. This prima facie presumption may be overthrown by proof, to the satisfaction of the jury, that the injury complained of resulted from inevitable accident, or from something against which no human prudence or foresight could provide."

Phila. and Reading R. R. Co. vs. Anderson, 94 Pa. 351.

"The presumption of a fact in law, which carries a case to the jury, necessarily leaves them in the possession of the case, without regard to the strength of the rebutting evidence."

Railroad Co. vs. Miller, 87 Pa. 395.
Railroad Co. vs. Weiss, 87 Pa. 447.
Railroad Co. vs. Schultz, 93 Pa. 341.
Spear vs. Railroad Co. 119 Pa. 61.

Having said so much in explanation of how the case turns upon this statute, let us ask

WHY WAS THE ACT PASSED?

Chief Justice Paxson in *Penna. Railroad Co. vs. Price, 96 Pa. 256, page 264*, argumentatively supposes in this language as to what might have actuated the Legislature to create the monster of April 4, 1868.

"At the time this decision was rendered (Catawissa R. R. Co. *vs.* Armstrong, 49 Pa. 186), the law seemed to contemplate but two classes of persons on railroad trains, viz: 1. Passengers who paid fare or who travelled by virtue of a contract relation with the company, and 2. Employees who were in the service of the company. The Act of 1868 was manifestly intended to create a third class who were neither employees nor passengers, namely, persons who are 'lawfully engaged or employed in or about the roads, works, depots and premises of a railroad company, or in or about any train or car therein, of which such person is not an employee.'" He, however fails to define such class; and in a lengthy opinion of poor law and worse reasoning (as we think) the judgment is rendered that a route agent of the United States Post Office Department, injured while at his place in his car with the train, through the negligence of the Penna. R. R. Co., without any negligence on his part, by two trains going in opposite directions on the same track running into

each other, was without remedy by reason of the Act of April 4, 1868.

Other cases that are as bad if not worse than this one, are *Cummings vs. R. R. Co., 92 Pa. 82; Railroad Co. vs. Colvin, 118 Pa. 230; Riard vs. North Penna. R. R. Co., 89 Pa. 193, and Kirby vs. Penna. R. R. Co., 76 Pa. 506.*

The Act was largely discussed in the Constitutional Convention of Pennsylvania in 1873. In the printed debates thereof, in volume 2, page 731, this language is used by Mr. Newlin, one of the members, viz: "I think, sir, that all that is proven by the fact that these 'blood acts'—for that is the name by which they should be known—the only argument, the only thing which can be shown by the existence of these infamous acts upon the statute books of other states is that the same influence which was brought to bear upon the State of Pennsylvania to put that infamy upon our statute books was used in other states as well. It is a notorious fact, it is well known to every one in this community that the Act of Assembly of Pennsylvania which limits the liabilities of railroad companies in cases of accidents; it is perfectly well known and notorious that the act was *bought* and *paid for*, and that it passed the Legislature of this state by corrupt means."

The act is thoroughly discussed from pages 727 to 744 in said volume 2.

In volume 5, page 293, this language was used:—

"Mr. Cuyler. The reasons that led to the passage of the act need not be enumerated. They were persuasive of the legal mind.

"Mr. Mann. Mr. President: I simply wish to sustain the view of the gentleman from Philadelphia, that the reasons urged on the Legislature for the passage of what is known as the calamity act were very persuasive. Quite a number of gentlemen were convinced by the persuasion. (Laughter.)

"Mr. Cuyler. I would inquire of the gentleman the source of his knowledge on the subject, as he was a member of that very House."

Justice Paxson may be in error as to the reason of the passage of this act—this infamy!

Of course we do not cite these Convention Debates as authority, but it will not deter from inquiring more closely into the Act's constitutionality.

WHY HELD CONSTITUTIONAL BY STATE COURTS.

The constitutionality of this act has been constantly questioned under the Constitution of the State, but the point raised under the XIVth amendment had not before this case been raised. The case in which the Supreme Court of Pennsylvania upheld its constitutionality was that of *Kirby vs. Penna. R. R. Co., 76 Pa. 507.*

The general ground upon which the Court there affirms the Act is valid as that it is an exer-

cise of the police power by the State. Speaking in reference to the facts in the case, the Court uses this language:

"The relation he assumes is one of danger, and the fact of danger authorizes the regulation by the State, as the conservator of the lives, security and property of her citizens. The act is a police regulation, which having respect to the general good, forbids individuals from undertaking a dangerous employment, except at their own risk, to the same extent as if they were in the immediate employment of the railroad company."

The reason upon which the decision is put, that it is a police regulation, is wholly fallacious. It is not a police regulation because it does not regulate. It was not passed by the Legislature as such, but as an "Act regulating to railroad companies and common carriers, defining their liabilities." The general public is not affected by it. In every case yet considered in the Supreme Court, the only parties concerned were the Railroad Company defending their negligence against the suit of the plaintiff. The Act might appropriately have been called "An Act to relieve railroad companies from liability for negligence.", or "An Act to make a gift of the blood, the limb, the life of certain specifiedly situated citizens to railroad companies."

This Act can not come within the scope of a police regulation. The limit to the exercise of the police power, as laid down in *Potter's Dwarris page*

458, is this:—"The regulation must have reference to the comfort—the safety—or the welfare of society; and not in conflict with the provisions of the Constitution." This Act is so far from coming up to this definition of this power as to be not within sight of the mind's eyes. The public is not concerned in the remotest degree. The parties to a contract only are concerned in this case and undoubtedly in all conceivable cases.

In *Louisville vs. Nashville R. R. Co. vs. Commonwealth of Kentucky*, 161 U. S. 677 (40-849), the following language is used:—"Whatever is contrary to public policy or inimical to the public interests is subject to the police power of the state and within legislative control, in the exercise of which the legislature is vested with a large discretion beyond the reach of judicial inqury, if it is exercised *bona fide* for the protection of the public."

As said in *Lawton vs. Steele*, *152 U. S. 133* (38-385):—"The police power of a state extends to everything essential to the public safety, health, morals, and justifies the destruction or abatement by summary proceedings, of whatever may be regarded as a public nuisance. To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legisla-

ture may not under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.

"In Rockwell vs. Nearing, 35 N. Y. 302, an act of the legislature of New York which authorized the seizure and sale without judicial process of all animals found trespassing within private enclosures, was held to be obnoxious to the Constitutional provision that no person should be deprived of his property without due process of law. See also Austin vs. Murray, 16 Pick. 121; Watertown vs. Mayo, 109 Mass. 315, 12 Am. Rep. 694; Butcher's Benev. Asso. vs. Crescent City L. S. L. & S. H. Co. ("Slaughter House Cases"), 83 U. S. 16 Wallace 36 [21:394]; Re Cheesebrough, 78 N. Y. 232; Brown vs. Perkins, 2 Gray 89. In all these cases the acts were held to be invalid as involving an unnecessary invasion of the rights of property, and a practical inhibition of certain occupations harmless in themselves, and which might be carried on without detriment to the public interests."

This Act does not come up at all to the requisites above laid down. In every case there are only two parties concerned, the robbed and the robber—in no case the public.

In *Brennan vs. City of Titusville*, 153 U. S.

289 (*38-719*), reversing the Supreme Court of Pennsylvania (*143 Pa. 642*) Justice Brewer uses this language in reference to the discrimination between citizens under the guise of its being a police regulation, viz:—

"There is no discrimination except between manufacturers and licensed merchants on the one hand, and the rest of the community on the other, and unless it be a matter of just police regulation to tax for the privilege of selling to manufacturers and merchants, it can not be to tax for the privilege of selling to the rest of the community. If, under the excuse of an exercise of the police power, this ordinance can be sustained, and sales in the manner therein named be restricted, by an equally legitimate exercise of that power almost any sale could be prevented."

So, if this Act is a legitimate exercise of the police power, almost any of the rights of a citizen can be taken away under it.

In a late case in Pennsylvania, *Commonwealth vs. Zacharias, 3 Penna. Sup. Court Reports, 264*, decided in 1897, an Act of Assembly regulating the business of druggist, which permitted certain unqualified persons (the widow of a qualified person) to engage in the retail drug business, was declared unconstitutional, the Court using this language:—

"If a statute is only directed against certain persons who are engaged in a given business or against commodities in such a manner as to dis-

criminate between those who are engaged in the same trade or pursuit, in aid of some, at the expense of others, such statute is not a police but a trade regulation. The Act of 1891, in that it permits certain unqualified persons to engage in the retail drug business and excludes others, is not an exercise of police power, but presents a condition of class legislation and is therefore unconstitutional, and falls under the ruling of Sayre Borough vs. Phillips, 148 Pa. 482."

In *Sayre Borough vs. Phillips*, which was the case of an ordinance prohibiting all persons from peddling within its limits except citizens of the borough, Justice Williams declared the same unconstitutional, saying:—

"It is very clear that a police regulation must be directed against the business or practice that is harmful, not against one or some of the persons who may be engaged in it. If a statute or municipal ordinance is in reality directed against certain persons who are engaged in a given business, or against certain commodities, in such manner as to discriminate between the persons who are engaged in the same trade or pursuit, in aid of some, at the expense of others, such statute or ordinance is not a police but a trade regulation, and it has no right to shelter itself behind the police power of the state or municipality. * * * The proviso converts the police regulation into a trade regulation."

These citations thoroughly dispose of and

refute the claim that the statute is a police regulation. It is in short no regulation at all, but a simple taking from one and giving to another.

And upon this point in *Norman vs. Heise, 5 Watts & Sergeant, 171*, the Court uses this language:—"The Legislature cannot take the property of one individual, with or without compensation, and give it to another." (The statute here considered was an *as if* one).

And in *Calder vs. Bull, 3 Dallas 386*, the Court says:—"This fundamental principle flows from the very nature of our free republican government that no man should be compelled to do what the laws do not require, nor refrain from acts which the laws permit."

It is not a police regulation. That claim is absurd.

ITS CONSTITUTIONALITY.

Having shown the falsity of the position sustaining it as a police regulation, let us ask ourselves what is the Act? What does it do? It is an Act, as stated in its title, "defining the liabilities" of railroad companies. It therefore deals with the rights of parties. The right of a person to have redress against another through whose negligence he has suffered an injury was a clearly defined and well understood right before the passage of the Act. It was a well-known common law right, existing prior to all statute law, when the Constitution was adopted. This right became

one of the "inherent indefeasible rights" which are declared to be "excepted out of the general powers of government to remain forever inviolate." The effect of this Act is to destroy this fundamental right of the citizen when in a certain situation. *It takes the right from the party to whom it belongs and bestows it without compensation* to the railroad companies. And it is done, not by a law passed, applicable to all alike—*not by changing a rule of right*—but by a legislative direction to the Courts commanding them when a certain state of facts exist which would require the application of a certain principle of justice and right, *not* to decide the merits of the case according to that principle, but according to a principle applicable to a quite different state of facts. The Legislature does not say that one fact shall be another; but the same result is accomplished by directing the Courts *to consider one* fact "*as if*" it were *another*.

To the poor victim of this harsh Legislative degree, passed undoubtedly without a full consideration of its unjust and unjustifiable consequences, the Courts are no longer open to have right and justice administered as the facts are, but he is denied a hearing;—or what amounts to the same thing, his case is treated "*as if*" it were something else. He is denied from having the facts upon which his case depends considered as they are, and he is thus deprived of "remedy by due course of law." In any other situation he, and every other person, including railroad companies, if injured

by the negligence of another, shall have the right as the truth is; but when a *railroad company* is the injuring party, in certain cases brought by a specified few, the truth shall no longer be considered truth.

Why is a party in this situation denied this common law right? Not because he is where the law prohibits him from being, nor because he is engaged in doing something he should not do, nor because it is not meritorious to do what he does, but simply because the Legislature has said so. The Legislative enactment does not imply that he shall do differently from what he has done heretofore; neither does it declare that such contracts are thereafter to be unlawful; but it says in effect this:—Do just as you have done heretofore, make exactly the same contracts and carry them out as made. If, however, the one party (the passenger on the railroad company) thereto is injured, the Courts are directed to consider the right of the injured party to have remedy therefor not as the facts of the contract and situation are but "*as if*" the contract and situation were entirely different.

Can an Act of the Legislature substitute a new contract in place of a lawful contract that has been broken, and declare that the rights of the parties shall be determined according to the substituted contract instead of according to the contract the parties themselves had made? Or, can the Legislature say that it is perfectly lawful and we will allow you to enter into such contracts, but we will

direct the Courts to consider such contracts not as they really are but *as if* they were different ones?

The plaintiff under the laws of the State of Pennsylvania was clearly a passenger. The Courts have in the same jurisdiction in the case of the plaintiff applied a different rule in measuring the plaintiff's rights than the rule used in measuring the rights of others of the same class.

The plaintiff was upon the cars of the defendants in pursuance of a lawful contract. A person can only enter and be upon the premises of a railroad company *without being a trespasser* by reason of a contract. If he enters in pursuance of a contract, he *must* do so either to perform some service for the railroad company for which they pay him a compensation, or a service is rendered *him* by them for which *he* pays them a compensation. He must go there either to render or accept a service. All cases naturally and necessarily fall into the one or the other category. In this case the plaintiff paid for a service rendered him; why, then, should he be treated and have his case considered and decided "*as if*" he belonged to the other class?

To say that one who pays for a service rendered him shall be considered in the same class as the one who is paid for rendering the service, is so manifestly absurd and unjust that the very statement of the proposition should be enough to condemn it.

The case of the plaintiff and any other passenger can not be distinguished. The rights of both rest upon contract. They both pay for the *same service* rendered i. e. their conveyance from one place to another. The mandate of the Legislature to the Courts can not take the case of one or a few cases of a class to which they belong and direct a special rule in the adjudication of their rights different from the rule applied to all others of the same class. This is a denial of "the equal protection of the laws" to those few.

Every citizen of the State of Pennsylvania has the right when he brings a person into court to answer for an injury sustained through his negligence to prove any fact which may be necessary to establish his right to have redress. In the case of the plaintiff this right is denied by the legislative mandate of this Act to consider the actual facts "*as if*" they were other and different facts. This is not "due process of law" and is denying to the plaintiff "the equal protection of the laws."

It seems that a Court of Justice has too high a regard for truth to ever consent to consider one thing "*as if*" it were another,—one fact as another.

Again the trial Court in the charge to the jury declared the plaintiff to be a servant of the defendants and a fellow servant of the train hands running the train on which he was carried when injured, yet there is *not a scintilla of evidence to show* that he was helping to run the train. He himself and all the train hands swore that he was

not so helping. *It is certainly not a fact.* He and the train hands had no common employer; nor were they engaged in a common employment. Those running a train are under the law fellow-servants; but the plaintiff was not helping to run the train at all.

How a person like the plaintiff, not helping to run the train and doing nothing while on it, not employed by the railroad company and not doing any work usually done by their employees, can be classed as a fellow-servant of the engineer who runs the train is beyond our comprehension. It may be asserted or declared that they are fellow servants but it can not be demonstrated by the stern rules of logic and of truth. The chasm is so wide that it can not be spanned even by the wildest flight of the imagination!

How then can the plaintiff be compelled to have his rights determined by the rule applicable to a case where such was the fact? In thus compelling him to have his rights determined according to the rule established for measuring the rights of a servant of a railroad company injured through their negligence and in compelling him to assume the relation of a servant of such railroad company, when in truth he was no servant of such railroad company, is such a violation of the fundamental principles of right and distributive justice upon which our government is founded as to excite the gravest apprehension, is such a variance from them as would not be tolerated were it not because it

affects but a very few and therefore escapes public attention. It seems to us that a Court must forget the essential and foundation principle, constituting the basis of all our laws, enunciated in the Declaration of Independence, that "All men are created equal" and shall stand on an equality before the law, when they give life and validity to such a monstrous perversion of all right and departure from the established rules of measuring out justice.

For a Court to say that by reason of this statute the plaintiff was on the train of the defendants as one of their servants and a fellow servant of the train hands, when in truth and in the absence of the Statute no such facts would have existed, is the making by the Legislature of facts that do not exist, and applying such facts in a case. Such facts are worse than perjured ones!

Can a Court whose daily duty is trying to find out what the truth is be author of and declare a deliberate falsehood? Perpetrate a fraud upon a suitor? Impossible!

The rule as settled by the Constitution and law of Pennsylvania is that disputed facts from oral testimony must be found by a jury, yet under the rulings upon this Act, and in this case, the Court determines the fact whether the plaintiff comes within the provisions of the Act or not. Finds whether the plaintiff is a passenger or a servant of the railroad company. This finding by the trial Court of the plaintiff as a servant of the

railroad company in the present case is in such flagrant disregard of the truth and all justice as to shock the moral sense of man. This Act, a piece of class legislation of the most iniquitous kind, has been extended by construction even far beyond the intent of the Legislature.

The Act was passed right after the decision of *Railroad Company vs. Meyers*, *supra*, and under fair rules of construction would not amount to more than the legislating of that decision into statute law; yet by construction it has been extended as to make the person subjected to its provisions hold his rights, life and liberty at the will of the trial judge.

In this respect, as the law is administered, it discriminates against the plaintiff and others in such situation as to the right of trial by jury.

By reason of the Act, the Courts not only find facts concerning which there is no evidence but they find facts directly contrary to the undisputed facts in the case. Yet under the laws of the State of Pennsylvania (as declared in *Ulrich vs. Arnold*, *120 Pa. 170*, page 182), "It is error to submit to a jury a question of which there is no evidence." As much so is it error for the Court itself to find a fact concerning which there is no evidence.

To state the proposition plainly, in the present case, a fact is suppressed and a fact which does not exist is declared to exist; and as a result a new contract is substituted for the contract the parties themselves had made. And this is done by a

Legislative mandate to the Courts directing that when a particular state of facts exists, to treat these facts "*as if*" they were something else. By this Act the judiciary are directed if fact "*A*" is proved to mete out justice "*as if*" fact "*B*" was the truth. Facts can be changed by the Courts through authority of the Pennsylvania Legislature. *One thing* is to be treated "*as if*" it were *another*.

Looking at it from the standpoint of fairness it is dishonest, looking at it from the standpoint of reason it is an absurdity.

Another direction in which it operates unequally is this, it relieves railroad companies from liability for their negligence, while not relieving any others from such liability; yet it has repeatedly been decided by the Supreme Court of Pennsylvania, that common carriers can not relieve themselves from negligence even by contract. That it was against the policy of the law for them to do so.

In *Penna. R. R. Co. vs. Henderson, 51 Pa. 3 5, page 331*, the release given read as follows, viz: "The person accepting this free ticket assumes all risks of accidents, and expressly agrees that the Company shall not be liable, under any circumstances, whether of negligence by its agents or otherwise, for any injury to the person, or for any loss or injury to the personal property of the party using it." The Court says:—"Our doctrine, settled upon grave deliberation, declares that such a release is no excuse for negligence."

In *Railroad Co. vs. O'Hara, 3 Pennypicker, 190*, the case of a person riding on a free pass upon a contract similar to one above quoted, the Court says:—

"A common carrier can not protect himself by special contract from liability for negligence. If the free pass was unlawful, the conductor should have demanded the regular fare, and his not doing so did not make the plaintiff a trespasser, or destroy her rights as a passenger."

If this case stands, the plaintiff is without redress, and the defendants are relieved from liability for negligence. The negligence was theirs, under the well known maxim, *qui facit per alium facit per se.* Others are not relieved from negligence in any case. The measure of justice denied the plaintiff would be exacted from him were the positions of the parties to this suit reversed. There would be no special legislative mandate directed to the Courts granting him immunity from liability (or partial immunity) were he defendant and the Cornwall Railroad Company the plaintiffs. As said in *Commonwealth vs. Zacharias, supra*, "The Act is not an attempt to regulate a business but an illegal attempt to legislate in favor of a class." The rule of equality is violated by the Act in this respect.

As was said in *United States vs. Cruikshank, 92 U. S. 555* (23-592):—"The equality of the rights of citizens is a principle of Republicanism. Every republican government is in duty bound to protect

all its citizens in the enjoyment of that principle, if possible." The amendment was added to the Constitution to uphold and enforce this grand foundation principle. We can not but feel that this principle is violated when one of two parties seeking redress for the same injury by the same remedy is deprived from a full hearing of the facts upon which his case depends by a legislative enactment that Courts shall treat those facts "*as if*" they were different ones, while the other shall have a full hearing and justice as the facts are.

In that the Act takes the case of the plaintiff out of the class (passengers) to which he belongs and makes his right to redress more burdensome (destroys it), it is denying him "The equal protection of the laws;" in that it deprives him of the privilege to prove the truth, it is not "Due process of law."

As authority in support of these propositions, we cite the following numerous list of cases:

DeChastellux vs. Fairchild, 15 Pa. 18, was the case where the Act of Assembly in question enacted that a new trial be granted and allowed by the Court of Common Pleas in a certain action therein instituted and carried to final judgment in the Supreme Court, and directed "That the said case be proceeded in to trial and judgment, with like effects in all respects *as if* the same had not been heretofore tried in said Court and passed upon on motion for a new trial."

Held unconstitutional, Chief Justice Gibson delivering the opinion.

In *Menges vs. Dentler, 33 Pa. 495*, the Act of Assembly declared that the Sheriff's deed for a tract of land lying partly in Lycoming County and partly in Northumberland County and sold by the Sheriff of Lycoming County, Pa., upon process issued out of the Common Pleas of said County "Should be good and valid to all intents and purposes, in the same manner and with the same effect, *as if* the whole of the said tract of land were situate in the County of Lycoming."

The Act was declared unconstitutional.

Baggs' Appeal, 43 Pa. 512, was a case where, when the decree of final distribution in the estate of John H. Baughman, administrator of Andrew Hendrickson, of Allegheny County, deceased, had been made over eleven years, an Act of Assembly was passed declaring "That it shall be the duty of the Orphans' Court of Allegheny County, on petition of any party in interest, to grant a review of the administration account, &c., with the same effect *as if* application had been made within five years next after such decree."

Held unconstitutional, Chief Justice Lowrie using this language:—

"There is nothing plainer (516) in the bill of rights than the principle that all men must stand on an equality before the judicial tribunals, and they do not stand so, if the judiciary is bound to

admit an inequality created by a legislative decree, by which a statute of limitation or any other element of the remedy is set aside or altered for any particular case or person, so as to affect the right. * * * Equality of administration is a large and essential element of justice. * * * That legislation can not be just that gives opposite rules for distinct cases in the same class, that excludes any case from the class to which it naturally belongs, that says to persons in general, you shall have the protection that naturally arises from lapse of time, and to some particular person you shall not have it. This is nothing like 'the due course of law.'"

Richards vs. Rote, 68 Pa. 249, is the case of another "*as if*" statute held unconstitutional.

These statutes quoted and held unconstitutional were identical with the present one in that they attempted to change existing facts by giving them the force of different facts. The 1st section of the XIVth Amendment would avoid every one of these statutes.

In *Ziegler vs. S. & N. Alabama R. Co. 58 Ala. 599*, it was held that an act fixing absolute liability on a corporation to make compensation for injuries done to property in the prosecution of its lawful business, without negligence or wrong on its part, when under the general law of the land no one else was so liable under such circumstances, did not provide for "due process of law" and was void, the Court saying:—

"Due process of law implies the right of the

person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or property, in its most comprehensive sense, to be heard, by testimony or otherwise, and to have the right of controverting by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law. * * * If this were so (everything in the form of an enactment to be law) acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void "

In *People Ex. Rel. Witherbee vs. Supervisors*, *70 N. Y. 228*, this language is used by the Court:—

"Due process of law requires, that a party shall be properly brought into court, and that he shall have an opportunity when there, to prove any fact which, according to the Constitution and the usages of the common law, would be a protection to him or his property."

As to what is "due process of law," Chief Justice Gibson, in *Norman vs. Heise*, *supra*, uses this language:—"What law? Undoubtedly a pre-

existent rule of conduct not an *expost facto* rescript or decree made for the occasion. The design of the convention was to exclude arbitrary power from every branch of the government; and there would be no exclusion of it if such rescripts or decrees were to take effect in the form of a statute."

Chief Justice Bronson in *Taylor vs. Porter, 4 Hill, 145 N. Y.*, says:—"The words 'law of the land,' as here used, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense."

Comstock, Justice, in *Wynehamer vs. People, 13 N. Y. 378, page 392*, said:—"To say that 'the law of the land' or 'due process of law' may mean the very act of legislation which deprives the citizen of his rights, privileges or property, leads to a simple absurdity. The true interpretation of these constitutional phrases is, that where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away. The cause or occasion for depriving the citizen of his supposed rights must be found in the law as it is, or, at least, it can not be *created* by a legislative act which aims at their destruction. Where rights of property are admitted to exist, the Legislature cannot say they shall exist no longer. It is plain therefore, (*page 395*) both upon principle and authority, that these

constitutional safeguards, in all cases, require a judicial investigation, *not to be governed* by a law specially enacted to take away and destroy existing rights, but confined to the question whether, under the pre-existing rule of conduct, the right in controversy, has been lawfully acquired and lawfully possessed."

In *State vs. Staten, 6 Coldw. (Tenn.) 244*, it was held that an act of legislature conferring on the Governor the power to set aside and annul the registration of the voters of a county, in whole or in part, was unconstitutional, as depriving them of their rights "without due process of law."

In *Sears vs. Cottrell, 5 Mich. 254*, this language is used:—

"By 'the law of the land' we understand laws that are general in their operation, and that affect the rights of all alike; and not a special act of the legislature, passed to affect the rights of an individual against his will, and in a way in which the same rights of other persons are not affected by existing laws."

"The fourteenth amendment applies to all citizens of the United States, and is intended to protect them in their privileges and immunities as such, against the action as well of their own State as of other States in which they happen to be. The privileges and immunities do not consist merely in being placed on an equality with others, but embrace all the fundamental rights of a citizen

of the United States as such. One of these fundamental rights is the right to pursue any lawful employment in a lawful manner, or in other words, the right to choose one's own pursuit subject only to constitutional regulations and restrictions."

Live Stock Association vs. Crescent City Co., 1 Abb. (U. S.) 388. Cited also in Note 2, Am. & Eng. Encyclopædia of Law, Vol. 3, page 727.

The case of *Millett vs. People of Illinois, 5 Western Reporter, 155*, decides that "The General Assembly has no authority to select out one class of business, and deny to persons or corporations engaged therein the privilege to contract for labor and to sell their products without regard to weight; while at the same time it allows to persons engaged in all other classes of business those privileges; hence, a statute which imposes on the owner of a coal mine the obligation to make all his contracts for labor to be regulated by weight, and imposes upon him the duty to provide scales for this purpose, is unconstitutional." The Court in the opinion uses this language:—

"The words 'due process of law,' are held to be synonymous with the words, 'the law of the land,' (Cool. Const. Lim. 1st ed. 352, 353); and this means general public law binding upon all the members of the community under all circumstances, and not partial or private laws affecting the rights of private individuals or classes of individuals. *Janes vs. Reynolds, 2 Tex. 251.* See

also *Wynehamer vs. People, 13 N. Y. 432; Vanzant vs. Waddel, 2 Yerg. 269.*

"'Every one,' says Cooley (Const. Lim. 1st ed. p. 391), 'has a right to demand that he be governed by general rules, and a special statue that singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but an arbitrary mandate, unrecognized in free government. Mr. Locke has said of those who make the laws:—'They are to govern by promulgated, established laws not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court, and the countryman at the plough,' and this may justly be said to have become a maxim in the law, by which may be tested the authority and binding force of legislative enactments.

"And again the same authority says (p 393):—'The doubt might also arise whether a regulation made for any class of citizens, entirely arbitrary in its character, and restricting their rights, privileges or legal capacities in a manner before unknown to the law, could be sustained. * * * Distinctions in these respects, should be based upon some reason which renders them important—like the want of capacity in infants and insane persons; and if the Legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build

such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the Act would transcend the due bounds of legislative power, even if it did not come in conflict with express constitutional provisions. The man or the class forbidden the acquisition or enjoyment of property in the manner permitted to the community at large would be deprived of liberty in particulars of primary importance to his or their pursuit of happiness.'

"See also *Budd vs. State*, 3 Humph. 483, where the section of the Act incorporating the Union Bank, which provided that if any of the officers, agents or servants of that bank should embezzle the funds of the bank, or make false entries, they should be guilty of felony, was held unconstitutional, because it did not apply generally to officers, agents or servants of banks committing like offenses. And *Wally vs. Kennedy*, 2 Yerg. 554, where an Act authorizing the Court to dismiss Indian Reservation cases, where prosecuted for the use of another, was held unconstitutional. In the last case the Court said: 'The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic or land under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void.

Were it otherwise, odious individuals or corporate bodies would be governed by one law, the mass of the community and those who made the law by another; whereas, a like general law affecting the whole community equally could not have been passed.' On like principle is also *People vs. Marx*, 99 N. Y. 377.

"What is there in the condition or situation of the laborer in the mine to disqualify him from contracting in regard to the price of his labor or in regard to the mode of ascertaining the price? And why should the owner of the mine, or the agent in control of the mine, not be allowed to contract in respect to matters as to which all other property owners and agents may contract?

"Undoubtedly, if these sections fall within the police power, they may be maintained on that ground; but it is quite obvious that they do not. These requirements have no tendency to insure the personal safety of the miner or to protect his property or the property of others. They do not meet Dwarris' definition of police regulations. They do not have reference to the comfort, the safety or the welfare of society. Dwar. Stat. Potter's ed. 458.

"We do not think that the General Assembly has power to deny to persons in one kind of business, the privilege to contract for labor and to sell their products without regard to weight, while at the same time allowing to persons in all other kinds of business this privilege; there being noth-

ing in the business itself to distinguish it in this respect from any other kind of business. * * * We do not think he (owner of mine) can be compelled to make all his contracts in these respects to be regulated by weight."

We would also invite the attention of the Court to the case of *County of Santa Clara vs. Southern Pacific R. R. Co., 118 U. S. 394*, (30-118, page 122), showing how the point there raised was decided in the Circuit Court, although this Court sustained its decision on other grounds.

The case of *The Chicago, Milwaukee & St. Paul R. R. Co. vs. The State of Minnesota, ex. rel., 134 U. S. 418* (33-970) is also in point to show that the Act under consideration is not due process of law in that it denies the plaintiff the opportunity to prove a fact.

The principles enunciated in the opinion in *Yick Wo vs. Hopkins, 118 U. S. 356* (30-220), we commend to the attention of the Court.

Taking into consideration the arbitrary, unjust and unequal manner in which the rights of the plaintiff were measured by the trial judge, the language there used might well be applied here:

"The facts establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the law as adopted, it is applied by the public authorities charged with their administration, and thus repre-

senting the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the plaintiff, as to all other persons, by the broad and benign provision of the XIVth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance (not the case here) yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this Court in Henderson vs. Mayer, etc."

The arbitrary manner in which the rights of the plaintiff were denied him by the trial Court, the denial to him of the opportunity to prove the truth and have it considered as proved, the absurdity of the Act in that it implies that one fact may be considered as if it were another fact, the ridiculous absurdity of it in that it is an assumption by the Legislature that they can create facts and direct the Courts to interject those facts that do not exist into the trial of a case in the Courts, the false ground that it is a police regulation upon which the Supreme Court of Pennsylvania affirms its constitutionality, the heavier burdens it imposes upon the plaintiff in seeking redress than upon

others of the same class, *and because the plaintiff, if this Act is constitutional*, IS DENIED ALL REDRESS *for an injury suffered*, are the grounds upon which we confidently appeal to this Honorable Court to declare that the first section of the Act of April 4, 1868, is not "Due process of law" and a denial to the plaintiff by the State of Pennsylvania within its jurisdiction of "The equal protection of the laws," and therefore is unconstitutional and avoided by the first section of the XIVth Amendment to the Constitution of the United States.

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